SUPREME COURT, U. S.

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In the

# Supreme Court of the United States

OCTOBER TERM, 1967.

MORRIS S. BROMBERG and
HOLIDAY LODGE, INC.,

*Plaintiffs-Petitioners,*

*vs.*

HOLIDAY INNS OF AMERICA and
HIOA, INC.,

*Defendants-Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners pray that a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the judgment of that Court entered on November 28, 1967, which affirmed an order of the District Court for the Northern District of Illinois, dismissing Plaintiffs' (Petitioners') complaint.

## OPINIONS BELOW

The opinion of the United States District Court has not been reported and is printed in the Appendix herein at page 13a, *et seq.*

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in ..... F. 2d ..... and is printed in the Appendix herein at page 1a, *et seq.*

## JURISDICTION

The judgment of the Court of Appeals was entered on November 28, 1967 (A. 1a).[1] No rehearing was sought by Petitioners. On February 19, 1968 this court extended the time to file this petition for Writ of Certiorari to and including March 18, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254.

## QUESTIONS PRESENTED FOR REVIEW

1. Does a dominant motel franchisor incur fiduciary responsibility where he invites a motel operator in financial straits to apply for a franchise; where after it obtains detailed financial information from him, executes a written commitment for a franchise contingent upon the owner's obtaining reinstatement of a defaulted mortgage or a commitment for re-financing; and for a time actively cooperates with the owner to obtain reinstatement of the mortgage? Does the fiduciary responsibility commence with the initial disclosures by the motel owner and the issuing of the letter of commitment by the fiduciary?

2. Does equity impose a constructive trust upon the franchisor which learns that the mortgagee intends to foreclose, avails itself of the information, acquired during the relationship with the owner, to open secret negotiations with the mortgagee, makes it virtually impossible for the motel owner to obtain alternate financing and then buys the motel from the mortgagee after foreclosure.

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[1] "A. .....)" as used herein refers to Appendix to this Petition.

## STATEMENT OF THE CASE

This is an equitable action by Bromberg[2] seeking a judicial determination that a motel, formerly owned by him, was subject to a constructive trust, on the theory that it had been purchased by Holiday Inns[3] in violation of a fiduciary relationship between them.

There is no dispute as to the controlling facts, which are essentially as stated by the Courts below. Inferences and conclusions from the facts are of course disputed. Because the facts as they appear in the opinions below are not set forth in context or in chronological order, for the convenience of this Court, we restate the facts.

Petitioner, an attorney and a former general counsel of the American Motor Hotel Association (A.2a), of which Holiday Inns was a member (R. 81)[4], became acquainted with Kemmons Wilson, Chairman of the Board of Holiday Inns, prior to 1960. In December 1960, Wilson visited Bromberg's motel in Chicago, which was experiencing financial difficulties, and was given a tour of the motel. Bromberg gave Wilson a statement of "operating expenses, a statement of the rates being charged for rooms and a breakdown of the salary structure and information about expenses for utilities." (A. 16a). Wilson appeared interested in purchasing the motel

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[2] Bromberg was president and, with his family, the sole stockholder of Holiday Lodge, Inc. While both are named as petitioners, for convenience, they will herein be designated as "Bromberg".

[3] Respondent HIOA, Inc. merged with Holiday Inns, and for convenience they will both be referred to as "Holiday Inns".

[4] (R. ....) as herein used refers to record references in the Appendix filed in the Court below.

and discussed a purchase price of $1,000,000.00 to $1,200,000.00 with Jerome Morris, Chairman of the Creditors' Committee for the motel. (R.84, 85).

In early January 1961, Wilson, having learned of the motel's financial difficulties and that the mortgage was in default, on his own initiative "just popped in" (R. 181) at the office of First Federal Savings & Loan of Chicago, the mortgagee. There he learned that a foreclosure was imminent, and among other things "threw out the suggestion that Holiday Inns might buy the mortgage." (R. 181-2). On January 25th, First Federal wrote Wilson that they were interested in the "propositions discussed" (P.X. 3).[5] On that same day, First Federal also sent a letter withdrawing from the Creditors' Committee (P.X. 64). On February 6th, after receiving First Federal's letter, Wilson wrote Jerome Morris breaking off negotiations, saying that the location was "sick" and that Holiday Inns had no further interest in the motel since it had determined that for its first entrance to Chicago it wanted to build its own Inn. (A. 65, P.X. 4). The very next day, however, he wrote First Federal asking to be notified if there was a repossession and sale of the property. (A. 17a); P.X. 5).

In the meantime a Chapter XI proceeding was filed by the motel and First Federal was enjoined by the Federal Court from foreclosing. (A. 14a). Wilson was informed of the injunction (P.X. 6).

From February 1961 to April 1961 and again from January 1962 until early 1963, the motel was operated exclusively by Bromberg, as Debtor in Possession. (A.

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[5] "P.X. ....)" refers to Petitioners' Exhibits which are bound in a single acco binder, and filed below as a part of the Record of this case.

16a) He thus had direct and exclusive access to all operating information.

To aid in his quest to straighten out the financial affairs of the motel and to raise additional capital, Bromberg engaged Howard Carlson, managing partner of Harris, Kerr, Forster, to prepare an analysis of the property and a projection of its failure. Carlson's firm was selected (R. 112) because it was (and still is) the accountant for Holiday Inns and close to its affairs. Carlson visited its headquarters in Memphis every few weeks and was very active in its business (R. 91). As shown later,[6] he was assigned to work with Bromberg to help in negotiations with the mortgagee.

In March 1962, Bromberg, who was operating the motel under the Chapter XI proceeding (A. 3a), met Wilson at a meeting of the Hotel Association and told Wilson he would like to discuss the Holiday Lodge matter to see "if some program could be worked out" (A. 3a). Bromberg also met with Carlson, who suggested that he call Wilson (R. 124). Bromberg did call Wilson, who invited him to the Memphis headquarters. Upon Bromberg's arrival the next day, he was referred to Jack Ladd, Vice-President of Holiday Inns. Bromberg and Ladd engaged in a lengthy meeting (A. 4a).

They discussed the financial problems of the motel and Bromberg's efforts to solve them. He brought Ladd a four page document containing current rent data, a summary of operating expenses, an income and expense statement for 1961, and a month by month breakdown of rentals during 1960 and 1961. He gave Ladd also the projection report prepared by Carlson (A. 17a); R. 113-

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[6] See Note 8.

114). Whereupon Ladd suggested a Holiday Inns franchise as a solution for Bromberg's financial problems (A. 4a).

Upon Bromberg's acceptance (R. 116) of Ladd's suggestion, Ladd prepared and delivered to Bromberg a letter[7] dated March 14, 1962, which stated that it was for the purpose of reviewing "an agreement reached verbally". The letter offered a franchise conditioned upon Bromberg's making his peace with First Federal or in the alternative, refinancing the existing mortgage elsewhere. At the trial, Ladd testified that alternate financing was contemplated by the parties:

> ". . . and he (Bromberg) thought that if Holiday Inns of America would grant him a franchise, that he would be in a stronger position to raise additional equity and also to get a substantial mortgage" (A. 5a).

In a memorandum to Wilson, following the meeting, Ladd expressed confidence that the proffered franchise would be a solution to Bromberg's problems:

> "I think we have worked out with him (Bromberg) a reasonable approach to his many problems."

The memorandum[8] further advised that Bromberg was to work with Carlson "to adjudicate his situation with the mortgage holder."

Several months later, Ladd made a special trip from San Francisco (R. 149) to attend a meeting at First Federal in Chicago, in order to advance the franchise

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[7] For the convenience of this Court, the letter is set out in A. 26a.

[8] See Memorandum A. 28a.

proposal (A. 19a) as a means of persuading First Federal to refrain from foreclosing its mortgage (A. 7a).[9] At the meeting it became certain that First Federal refused to consider any proposal and "adamantly adhered to its position that the foreclosure suit would proceed to sale." (A. 9a).

In April 1962, Wilson was informed that the previous month the Seventh Circuit Court had set aside the injunction barring the foreclosure (P.X. 12). Having learned that the injunction had been lifted and that the mortgage company was now free to foreclose, Holiday Inns, without notice to Bromberg, broke off negotiations with him and *sub silentio* withdrew its offer for franchise (A. 8a, 9a) and determined to acquire the motel for itself.

Unaware that Holiday Inns had determined to withdraw its offer for franchise, Bromberg, assuming the offer was still open, sought to obtain the alternate financing elsewhere,—as contemplated by the agreement with Ladd. He soon found a source, namely Harvey Rawson, Chairman of the Board of Realty Company of America, a man with considerable experience in financing real estate (R. 189).

Rawson testified that he had sought and found institutions prepared to give financing, that he himself was prepared to put up additional equity capital of $250,000.00 and would thus be willing to arrange refinancing of the existing mortgage provided Bromberg could obtain a Holiday Inns franchise (R. 190-191), and told Bromberg

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[9] This was Ladd's version of the meeting. According to Bromberg's testimony, the franchise proposal had previously been rejected and Ladd was to appear at First Federal to offer various guarantees in exchange for reinstatement of the mortgage. (A. 19a)

to get in touch with Holiday Inns to get the matter formalized (R. 122).

When Bromberg attempted to communicate with Holiday Inns, neither Wilson nor Ladd would accept his calls. Bromberg testified (R. 122-123) that being unable to reach Wilson or Ladd, he called Carlson and sought through him to find out why his calls were not being taken. He further testified that Carlson then reported to him that he had spoken to Ladd and that Ladd told him that Holiday Inns was not interested any further in Bromberg because it was planning to build its own motel in Chicago.

Both Wilson and Ladd testified that either they did "not remember receiving such calls or are sure that if they did, they attempted to return them. They were emphatic in denying that they attempted to avoid Bromberg's efforts to reach them." (A. 20a). At the trial, however, Ladd testified that it was possible that there might have been phone calls from Bromberg which he did not return (R. 152). He also testified that he "seem(ed) to recall" Carlson's inquiry (R. 153), and, when he was asked whether he would have failed to return calls from Bromberg, knowing his financial situation, Ladd replied: "Yes, I had no further interest with Mr. Bromberg." (R. 154).

When Bromberg reported to Rawson that Holiday Inns was no longer interested, Rawson did not proceed further (R. 191).

Except for his attempts to contact Wilson and Ladd by phone and his conversations with Carlson, as above described, following the May 1962 meeting at First Federal, there was no communication, oral or written, between Bromberg and Wilson or Ladd (A. 7a-8a).

After Holiday Inns summarily broke off negotiations with Bromberg, it immediately evidenced its intention to take steps to acquire Bromberg's motel for itself. Shortly after the meeting at First Federal, Wilson, in response to a letter from Jerome Morris informing him that the injunction was set aside, stated:

> "If the Holiday Lodge does come up for auction, I would appreciate your letting me know as we might want to bid on it if it sells cheap enough." (A. 9a).

While the foreclosure was pending, Wilson, without notice to Bromberg, secretly continued to "express his interest in purchasing the property" (for his company) and "had several discussions regarding it with people from First Federal." (A. 20a; A. 9a). Thereafter, when the property first became available for sale, Holiday Inns, without notice to Bromberg, purchased the motel, which had originally cost over $1,500,000 for $750,000. When Bromberg learned this, he filed the instant action to impose a constructive trust. Jurisdiction was founded on diversity of citizenship under 28 USC Sec. 1332, in that plaintiffs are Illinois citizens and defendants Tennessee corporations, with principal places of business in Tennessee. The matter in controversy exceeds $10,000 exclusive of interest and costs.

The District Court denied relief and the Court of Appeals affirmed.

## THE DECISION OF THE COURT OF APPEALS

The Court of Appeals held:

1. Despite the fact that:

   (a) Confidential information was invited by and given to Holiday Inns.[10]

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[10] CA Opinion (A. 16a; A. 17a).

(b) Holiday Inns for a time cooperated with Bromberg in an effort to aid his financial situation[11] so as to enable him to accept the proffered franchise.

(c) The vice-president of Holiday Inns acted on Bromberg's behalf to attempt to halt a foreclosure of a mortgage.[11]

nevertheless Holiday Inns was under no fiduciary duty towards Bromberg because no franchise agreement was actually signed or effectuated.

2. No fiduciary relation is created by the giving of confidential information or by the joint efforts to avoid foreclosure nor by the other joint acts to further the common enterprise.

3. Despite the fact that Bromberg repeatedly insisted that his was a suit to establish a constructive trust because of the breach of the fiduciary duties on the part of Holiday Inns, nevertheless the Seventh Circuit treated the case as if it were one for breach of or for specific performance of a contract.

4. Since there was no fiduciary relation between the parties, no constructive trust arose and Holiday Inns had the right to acquire for itself, the subject property of the proposed business relationship.

5. Even assuming a fiduciary relationship existed, it was extinguished when the parties learned the foreclosure proceeding was going forward.

6. Holiday Inns had no duty to communicate the withdrawal of its offer of franchise and was not obliged to notify Bromberg that it intended to acquire the motel for itself.

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[11] CA Opinion (A. 7a).

## REASONS FOR GRANTING THE WRIT

### I.

### THE FRANCHISING INDUSTRY REPRESENTS A SUBSTANTIAL SEGMENT OF THE COUNTRY'S COMMERCE AND PLAYS A MAJOR ROLE IN ITS ECONOMY. THE CASE RAISES FUNDAMENTAL LEGAL QUESTIONS REGARDING THE FRANCHISOR-FRANCHISEE RELATIONSHIP. HENCE A DECISION BY THIS COURT WILL HAVE IMPORTANT GENERAL SIGNIFICANCE.

In recent years there has been a phenomenal growth in the franchising industry which has become a significant factor in the national economy. Despite the enormous range of products and services embraced within the franchising industry, the economic and legal aspects are shared generally by all branches of the industry. The instant case appears to be the first to consider the legal implications of the franchisor-franchisee relationship. The views of this Court therefore would be of the utmost significance to this growing area in the American economy. The precise issues at bar are fundamental to the franchise relationship. Hence a decision of this Court will not be merely an isolated decision on a question of local law, but will set a benchmark for the law in this field.

Where once franchising was for all practical purposes limited to a few industries, operating on what was basically a principal-agency basis, today the industry covers an enormous spectrum of products and services. Moreover, it has become of major significance in the total economy. Its annual volume is estimated at over $70 Billion. There are at least 750 national franchisors,

exclusive of the older cola, automobile and oil companies, and it encompasses about 450,000 franchise outlets.[12] A 1967 publication of the U.S. Department of Commerce, entitled *Franchise Company Data*, in a space of 108 pages lists 30 companies and 149 franchisors who requested and qualify for listing in the publication.

The 1968 edition of *Franchise Annual* lists 780 franchisors, 28 of which are listed on the New York Stock Exchange, 11 on the American Exchange, and 33 public companies whose securities are traded Over-the Counter. Franchisors are now part of the "conglomerates" picture. In 1967, 12 major companies such as General Foods, Pillsbury Company, Radio Corporation of America and United Fruit Company, joined the franchise parade.[13]

The Defendant, Holiday Inns of America, typifies the spectacular growth in franchising. Recognized as the leader in the motel franchising industry, Holiday Inns began franchising motels in 1954. By 1962 it had grown to 234.[14] Today it has reached 858, of which, significantly, 139 are owned or operated directly by Holiday Inns.[15]

It is apparent from the aforesaid publications and other sources, that despite the enormous range of products and services embraced within the franchising industry, the various areas of the industry share essential economic and legal aspects. Thus:

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[12] "Importance of Franchising and the Role of Law", by Mary Gardner Jones, Commissioner, Federal Trade Commission; *Anti-Trust Bulletin*, Fall 1967, p. 722.

[13] Published by *Franchise Company Data*, Chicago, Illinois.

[14] See letter from Holiday to Bromberg offering the franchise (A. 26a).

[15] *Standard Listed Stock Reports*, issued by Standard & Poor Corp. (1967), Vol. 34, No. 189.

a. Between franchisor and franchisee, the franchisor is usually the dominant party. The franchisor usually has relatively greater economic resources and greater management skill and experience at his command. The franchisee usually is about to embark on a new venture. If he is already in business, he is seeking a franchise because he is faced with adverse circumstances and he hopes thereby to improve his position.

b. The contract agreement, almost universally, is prepared by the franchisor on its own standard forms. The basic provisions of the contract and the fees to be charged are set by the franchisor. Generally the franchisee has little bargaining power regarding the terms of the franchise. His decision is limited to whether he wishes to accept the franchise or not.

c. The franchise agreement is essentially a contract of adhesion. The pattern of the operation of the business is generally set by the franchisor who requires strict adherence to its established code.

d. The franchise agreement and its implementation necessarily results in a close continuing business association between the parties. The franchisee customarily relies on the franchisor for the national advertising and promotion of the product or services as well as direction and advice on the operation of the business. Indeed, it is these elements that impel the franchisee to acquire the franchise. Conversely, if the franchisor is to have a successful operation by the franchisee and thus a continuing outlet for its products and services, the franchisor must apply an acceptable level of direction and advice to the franchisee to make his business profitable.

e. Almost invariably the customers of the franchisee and the general public regard the franchisee's place of

business simply as one unit in a centrally owned chain. Thus the level of service provided by any one franchisee, reflects upon all franchisee outlets and upon the franchisor. It follows that the franchisor has a particular interest in seeing that each franchisee adheres to the desired standards. The franchisor may lay down rules regarding prices, condition of the premises, treatment of customers, and indeed respecting every phase of the business.

f. It is essential for the franchisor and the franchisee to work together closely. Thus where a product is sold, franchisees may be required to honor warranties on products sold by other franchisees. In the case at bar, involving a motel franchise, each franchisee is expected to make and honor reservations and to take and honor deposits for guests for and from other motels within the system.

Most, if not all, aspects of the franchise industry as outlined above are present in this case.

It has long been national policy to preserve and protect independent business enterprises as well as the general public. There are a host of Congressional enactments designed to achieve this end. The year 1890 witnessed the beginning of legislation designed to control excesses by large companies. First it was the Sherman Anti-Trust Act, followed by the Clayton Act in 1914. Later came the Robinson-Patman Act against price discrimination, and the Federal Trade Act, designed to prevent unfair competition. The Securities Exchange Act had as one of its basic objectives to prevent the misuse of information, to their own advantage, by persons standing in close relationship to public companies.

The Government has recognized that franchising can be of significance in the preservation of independent

enterprise in this country.[16] Congress established the Small Business Administration under Title IV of the Economic Opportunity Act of 1964, and authorized the making, participation in or guaranteeing of loans to assist in the establishment, preservation and strengthening of small businesses. The franchisee, because he is in business for himself, has an incentive to superior performance. A successful franchisee enjoys the benefits of large scale purchasing of products and services and also the benefits of expert management beyond the command of his own resources, and thus he is able to compete with the largest companies.

But, along with these advantages, there are dangers. The franchisor, by virtue of his superior economic position, is in a position to take advantage of the franchisee, and indeed, as this case demonstrates, to take advantage of information, furnished by a prospective franchisee, to acquire the subject matter of the proposed franchise for itself. In the area of automobile distributorships, the situation became so critical that the Congress found it necessary to enact legislation for the protection of automobile dealers in their relationships with manufacturers.[17]

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[16] See "Franchise Company Data For Equal Opportunity in Business", issued in February 1967 by *U.S. Department of Commerce/Business and Defense Administration.*

[17] See 15 USC, Sec. 1221, *et seq.* The Act gives an auto franchise an action for damages against an auto manufacturer who fails to act in "good faith" in performing under or terminating a franchise (Sec. 1222). "Good faith" is the duty to each party to act in a fair and equitable manner so as to guarantee the other freedom from coercion, intimidation or threats (Sec. 1221(e)). "This chapter is designed to supplement Anti-Trust laws in order to balance power heavily weighted in favor of manufacturers." *Kotula* v. *Ford Motor Co.*, 338 F. 2d 732 (CA 8th); to same effect see *Woodard* v. *General Motors*, 298 F. 2d 121 (CA 5th).

In the case at bar there was an incredible gulf between Bromberg, the prospective franchisee and the franchisor, Holiday Inns. Bromberg, being in financial difficulty with the motel, sought advice and counsel from Holiday Inns in order to save his property. Holiday Inns encouraged Bromberg in his quest and offered to help him. Bromberg responded by giving Holiday all the information about the motel including a prospectus prepared by an accountant who also served Holiday. Ladd, vice-president of Holiday Inns, attended a meeting with Bromberg at First Federal for the avowed purpose to "be of assistance to Bromberg in persuading First Federal to refrain from foreclosing its mortgage.[18] There he learned that First Federal was determined to foreclose. Holiday Inns, thereupon, immediately seized upon the information given it by Bromberg, and without any notice, shook off its self-assumed responsibility toward Bromberg and secretly negotiated thereafter with First Federal to acquire, and did in fact purchase the motel for itself.

This Court has not previously had occasion to consider the legal relationship between a franchisor and a franchisee or between prospective franchisor and franchisee. Some aspects of the relationship have come before this Court, notably with respect to unfair competition and anti-trust implications.[19] In each case this Court concluded that the arrangements under attack were illegal and not justifiable as means adopted whether to protect the dealership arrangements or to complete more effectively against stronger rivals.

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[18] See CA Opinion (A. 7a).

[19] See for example *U.S.* v. *General Motors,* 384 U.S. 127; *Federal Trade Commission* v. *Brown Shoe Co.,* 384 U.S. 316; *U.S.* v. *Sealy,* 388 U.S. 350; and *U.S.* v. *Arnold Schwinn & Co.,* 388 U.S. 365.

## II.

**THE DECISION BELOW CONFLICTS WITH: 1. APPLICABLE STATE LAW ON AN IMPORTANT STATE QUESTION. 2. DECISIONS OF THIS COURT. 3. DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL.**

a. *The Decision of the Court of Appeals.*

The Court of Appeals for the Seventh Circuit held that no fiduciary relationship was created even though Bromberg, relying on Holiday Inns' offer to help, gave it detailed confidential information about the motel, and Holiday Inns, in writing, offered a franchise and for a time cooperated with Bromberg in an effort to save his financial situation and even acted for him in attempting to halt the impending foreclosure. The reasons set forth in its opinion were that there was no contract but merely an offer for which no consideration was given and the offer was not signed by Bromberg. Another reason was that no franchise was actually granted, and no fraud was shown. The Court below further ruled that even assuming a fiduciary relationship existed, it was extinguished when the parties learned the foreclosure proceeding was going forward. Holiday Inns, it said, had no duty to communicate the withdrawal of its offer of a franchise and was not obliged to notify Bromberg that it intended to acquire the motel for itself.

The Court of Appeals wholly disregarded Petitioner's contention that the suit was to establish a constructive trust because of a breach of the fiduciary relationship. Instead it treated the case as one for breach of, or for specific performance of a contract.

The agreement recited in the March 14 letter offering a franchise was given an interpretation hostile to its clearly intended purpose, namely, to establish a proposed

business relation. Moreover, the Court treated the fact of First Federal's refusal to reinstate the mortgage, as rendering it impossible for Bromberg to meet the conditions set forth in the letter, and disregarded its own finding[20] that Ladd, the vice-president of Holiday Inns, referring to the proposed franchise had testified:

> ". . . and he (Bromberg) thought that if Holiday Inns of America would grant him a franchise, that he would be in a stronger position to raise additional equity and also a substantial mortgage."

It was therefore obvious that the parties contemplated by their *agreement*[21] that if First Federal would reinstate the existing mortgage no "substantial mortgage" would be required. On the other hand, if the mortgage could not be reinstated, that attempts would be made to refinance elsewhere, in which case it would be necessary to assure a prospective financing source that a Holiday Inns franchise would be available. Nevertheless, the Court below gave this agreement a tortured interpretation to mean that petitioner had first to obtain a commitment for refinancing before Holiday Inns would be obliged to commit itself to a franchise. What was obviously intended as a concurrent arrangement (franchise availability and refinancing) was treated by the Court of Appeals as a consecutive arrangement (refinancing availability then franchise), thereby making fulfillment impossible.

b. *The Opinion of the Appeals Court Is Contrary to Established Authority.*

Numerous Illinois cases and cases throughout the country were recited to the Court below in support of the

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[20] CA Opinion (A. 5a)
[21] CA Opinion (A. 4a)

proposition that a fiduciary relationship existed between the parties by reason of *all* of the "facts and circumstances" of the case and that once this relationship was created, Holiday Inns was barred from acquiring the subject matter of the business arrangement for itself. The Court below cited only one, *Carroll* v. *Caldwell,* 12 Ill. 2d 487, 147 N.E. 2d 69 and we respectfully submit, gave that case an incorrect reading. There the Supreme Court of Illinois held that an agreement for the sharing of royalties from an oil and gas lease on certain property constituted a joint venture. The defendant, subsequent to the agreement, learned that a lease, which the parties thought belonged to the plaintiff, had in fact expired. Whereupon, the defendant acquired a new lease on that property for himself. The court, based on these facts, held that a fiduciary relationship existed between the parties. The court outlining the broad scope of circumstances giving rise to a fiduciary relationship, held that on the "facts and circumstances" there before it, a joint venture had been created, but specifically declined to lay down an exact definition of what amounts to a joint venture. Instead the Supreme Court of Illinois chose only to point out certain "general characteristics" of a joint venture relationship. Nonetheless the Court below converted a deliberately flexible fiduciary definition of the Illinois Supreme Court into a rigid bed of Procrustes.

In the view of the Court of Appeals, the March 14 commitment did not fit precisely to the *Carroll* definition and hence did not constitute a joint venture or for that matter "for any other purpose".[22] The Seventh Circuit Court reached this erroneous conclusion relying in part on its own rigid decision in *Pinkowski* v. *Ooglay,* 347 F. 2d 411, a case which did not involve an *equitable* action.

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[22] See CA Opinion (A. 5a)

There can be no doubt that the decision of the Court of Appeals is erroneous. It is out of harmony with the decision in *Carroll* and with numerous other decisions of the Supreme Court of Illinois and of other courts.

Let us mention a few of them: In *Doner* v. *Phoenix Joint Stock Bank,* 381 Ill. 106, 45 N.E. 2d 20, plaintiff's property had been foreclosed and the period of redemption was running. Defendant, employed by the receiver that was operating the property, offered to help plaintiff raise the money to redeem in exchange for certain considerations to him. He even sought and obtained an extension of time to effect the redemption from the mortgage company. He did not in fact obtain the money for plaintiff. Instead, after the period of redemption had expired, he purchased the property for himself from the bank and took title in his nominee. The Illinois Supreme Court held that defendant's *self-assumed* responsibility created an agency relationship which was fiduciary and decreed a constructive trust in favor of plaintiff. This rule was reaffirmed in *Kuzlik* v. *Kwasny,* 383 Ill. 354, 49 N.E. 2d 212, 215, where the Court said: "The rule is that the relation of principal and agent is a fiduciary one (Cases). By assuming to act for Kuzlik, Kwasny took upon himself certain obligations, among which was not to deal with the subject matter of the agency to his own advantage." It is to be remembered that in the case at bar, Ladd on behalf of Bromberg also acted as agent in a self-assumed responsibility "in persuading First Federal to refrain from foreclosing its mortgage."[23] See also *Ditis* v. *Ahlvin,* 408 Ill. 416, 97 N.E. 2d 244.

The petitioner emphasized below that his action was *not* being brought to enforce a contract nor to establish

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[23] See CA Opinion (A. 7a)

a joint venture but rather to impose, by operation of law, a constructive trust and accordingly it was not necessary that the parties enter into a binding contract or that the proposed business arrangement contain all of the elements necessary to establish the legal entity of a joint venture, and cited numerous cases in support.[24] These cases were not considered.

The Court below, without citing *any* supporting authority, also bottomed its decision on the fact that no fraud was shown and that the franchise was never actually granted. The authorities are uniform in holding that actual fraud need not be shown to establish a constructive trust.[25] The fact that the franchise was not actually granted is of no consequence. The authorities hold that the *mere agreement* to enter into a *future* business arrangement creates the fiduciary relationship. In *Shellmar,* discussed on page 24 of this petition, a franchise was offered and not accepted. In *San Francisco Iron,* discussed on page 26 herewith, the agreement by its terms

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[24] For example: *Mason* v. *Rose,* 176 Fed. 2d 486 (CA 2d 1949); *Shellmar Prod. Co.* v. *Allen-Qualley,* 31 F. 2d 293, 296, Affirmed, 36 F. 2d 623 (CA 7th); also *San Francisco Iron & Metal Co.* v. *American Milling & Industrial Co.,* 1 Pac. 2d 1008, 1013 (Cal.) where the court stated the universal rule to be: ". . . it is unquestionably well settled that the strict rules governing in cases of ordinary contracts . . . have no application to cases of agreements involving the fiduciary relationship." N.B. This rule was laid down by this Court as early as *Massie* v. *Watts,* 10 U.S. (6 Cranch) 148, affirmed in *Irvine* v. *Marshall,* 61 U.S. (20 How.) 558, 565, 566, and the principle restated in *Board of Trade* v. *Christie,* 198 U.S. 236, 252.

[25] See for example, *Southern Pacific* v. *Bogert,* 250 U.S. 483, 492. *Meinhard* v. *Salmon,* 164 N.E. 545 (Mass.); *Carroll* (*Supra*) 147 N.E. 2d 69, 74; Restatement on Restitution, Par. 160; 4 Scott on Trusts, 2nd Ed. Par. 462.

was a "preliminary agreement". Nevertheless in both cases the fiduciary relationship was imposed by the Court.

The Court below, without any cited authority, compounded its error when it held that even assuming Holiday Inns was under a fiduciary obligation to Bromberg, such obligation was extinguished when it became known that the mortgage company was proceeding with its foreclosure.[26] This holding is clearly contrary to the authority established by this Court, which authority the lower Court is obliged to follow.[27] The rules established apply to a purchase by the confidant or fiduciary *even after termination* of the relationship.

In an oft quoted case, *Trice* v. *Comstock,* 121 Fed. 620 (CA 8th (1903)), defendant was engaged by plaintiffs, who were speculators, to seek available properties and to show certain lands to prospects. In the course of his work he discovered the location and value of various pieces of land. Three months later he renounced his agency and one month thereafter, while his principals were still endeavoring to sell a tract of land to a possible customer, the agent bought the land (which defendant learned about during his agency) for himself. The Court in charging the agent as a constructive trustee laid down the rule that: (p. 622, 623)

> "For reasons of public policy, founded in a profound knowledge of the human intellect and of the motives that inspire the actions of men, the law peremptorily

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[26] See CA Opinion (A. 8a).

[27] See cases cited in this petition (p. 26, et seq); See also *Carroll* (Ill. Sup), 147 N.E. 2d 69, 75. "The [fiduciary] relation ordinarily precludes one of them from purchasing or leasing property relating to the enterprise . . . for himself . . . in the absence of a full disclosure to his associates." See also *Ditis,* 97 N.E. 2d 244.

> forbids everyone who, in a fiduciary relation, has acquired information concerning or interest in the business or property of his correlate from using that knowledge or interest to prevent the latter from accomplishing the purpose of the relation . . . although the confidential relation has *terminated* before the trust was betrayed. . . . The only indispensable elements of a good cause of action to enforce such a trust are the fiduciary relation and the use by one of the parties to it of the knowledge or the interest he acquired through it to prevent the other from accomplishing the purpose of the relation."

In *Trice* the defendant contended that the plaintiffs had no contract for the land and that their scheme was to buy it and sell it at a higher price. Holding that this was a legitimate enterprise, the court there held the object of the agency of the defendant was to carry out this plan. His use of the knowledge he acquired through his agency

> "to prevent his principals from accomplishing this purpose and to appropriate the benefits of the scheme to himself alone was as flagrant a breach of confidence and as fatal to his title as it would have been if Trice and Beamer (the plaintiffs) had held an unassailable agreement for the purchase of the land.
>
> "Nor is it any defense to the suit to enforce this trust that the agency had terminated before the confidence was violated. The duty . . . does not cease when the employment ends. It is as sacred and inviolate after as before the expiration of the term." (p. 625).

In 1965 the Illinois Appellate Court followed the principle that the termination of the relationship did not terminate the fiduciary duty. In *Mile-O-Mo Fishing Club* v. *Noble,* 62 Ill. App. 2d 50, 210 N.E. 2d 12, defendant for a few months was president of a not-for-profit fishing

club. While he was president, the club negotiated to buy certain land. Subsequently defendant was defeated for re-election and ceased club activity. Thereafter he bought the property for himself. The Court held him a constructive trustee, ruling that once the fiduciary relationship is established the law presumes that any transaction between the parties by which the fiduciary has profited is fraudulent. Moreover, the Court held the burden rests on the fiduciary to overcome the presumption of fraud by clear and convincing proof of good faith.

In the case at bar, defendant made no such offer of proof.

Petitioner cited to the Court of Appeals its own 1929 decision in *Shellmar Products Co.* v. *Allen Qualley Co.*, 36 F. 2d 623, which affirmed Judge Lindley's decision in 31 F. 2d 293, 296. There plaintiff, a candy manufacturer devised a new wrapping machine which it discussed in confidence with defendant, a wrapping machine manufacturer. A contract for licensing the device was tendered by plaintiff but not accepted by defendant. Defendant immediately began to make the machine. A few days later, defendant discovered that the device was already patented and purchased the patent for a nominal sum. The Court affirmed Judge Lindley who held defendant was a constructive trustee and ordered defendant to assign the patent to plaintiff for the sum paid by defendant.

There, as here, plaintiff reposed confidence in defendant. There, as here, confidence was accepted. There, as here, confidential information was conveyed in anticipation of and in reliance upon a contemplated agreement which never materialized. There, as here, the defendant abused that confidence, and used the confidential information

for its own benefit. It is admitted here that defendant here obtained all financial and other information about the motel (except for two isolated scraps), from plaintiff. There, as here, defendant might have obtained, but did not obtain, the information from other sources (there, the patent office, here, brokers, etc.).

The Court of Appeals did not attempt to distinguish its own prior decision cited to it.

There was cited to the Court of Appeals numerous other decisions regarding the creation of the fiduciary relationship and the duties of the fiduciary once the relationship has been established. The Court of Appeals did not discuss a single one. Thus there is the famous decision of Judge Cardozo in *Meinhard* v. *Salmon,* 249 N.Y. 458, 164 N.E. 545 (1928). In that case two partners held a leasehold on valuable New York City property. As the leasehold neared its end, one of the joint venturers secretly negotiated for a renewal of the lease in his own name. The Court held the joint venturer to account. Judge Cardozo reminded us that joint venturers like co-partners owe to one another the duty of the "finest loyalty". "Conduct permissible in a workaday world" is forbidden to those bound by "fiduciary ties". "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."

Another case cited to the Seventh Circuit was the case of *Warsofsky* v. *Sherman,* 93 N.E. 2d 612, 614 (Mass. 1950), where a bank officer to whom the plaintiff merely told "where the property was, gave him details as to income and expenditures, and stated he wanted the property back",

was held to be a constructive trustee when he subsequently purchased the property for himself.[28]

Also relevant is *San Francisco Iron & Metal Co.* v. *American Milling & Industrial Co.*, 1 Pac. 2d 1008 (Calif. App. 1931). Then plaintiff and defendant entered into what they designated a "Preliminary Purchase and Sales Agreement" whereby they were to attempt to buy 4,000 box cars in Canada. The agreement *by its terms* was incomplete, as it provided that various terms were to be worked out and that "Final detail, agreement to be made at the time of purchasing of material." After months of effort, plaintiff finally obtained an option on the cars and notified defendant to put up his share of the funds. The defendant, however, secretly negotiated a deal for itself. The defendant was held a joint venturer and was required to pay damages.

This Court in years past has established similar standards in fiduciary cases. Thus, there is the decision in *Ringo* v. *Binns*, 35 U.S. (10 Peters) 269, 280, which laid down the general rule that an agent employed to represent a principal regarding specific property cannot acquire the property for himself. Indeed, this fundamental principle was laid down in the earliest years of this court by Chief Justice Marshall in *Massie* v. *Watts*, 10 U.S. (6 Cranch) 148 (1810), where the general principle was applied to a surveyor who discovering certain defects of survey, used the information for personal profit.

In recent years, in a wholly different context, the rule has been re-affirmed. In *Young* v. *Higbee*, 324 U.S. 204, de-

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[28] In the case at bar, the District Court found that Bromberg brought 4 pages of financial data about the motel and a projection report prepared especially for him by Carlson, who was also the accountant for Holiday Inns. (A. 17a).

fendants were preferred stockholders appealing a decree approving a plan of re-organization under Chapter X of the Bankruptcy Act. Thereafter they sold their stock and stipulated that the appeal be dismissed. A class suit was then filed by another preferred shareholder seeking to hold defendants to account for the difference between what they had received and the fair value of the stock.

This Court held that while defendants did not formally purport to represent the class, their success or failure was bound to have a substantial effect on the success of all other preferred shareholders. Hence the defendants, by their appeal, owed an obligation to all of the preferred shareholders, and specifically they owed them an obligation to act in good faith. "They cannot avail themselves of the statutory privilege of litigating for the interest of a class and then *shake off their self assumed responsibilities to others by a simple announcement that henceforth they will trade in the rights of others for their own aggrandizement.* To hold that the Chandler Act permits this, would be to say that Congress which sought more effectively to accomplish fair and equitable treatment of investors, had by granting a right to appeal to stockholders, defeated its purpose and had *substantially modified the whole body of law imposing the most rigorous responsibilities for fair dealing upon those who represent the right of others.*" (p. 213) (The Court cited *Meinhard* v. *Salmon,* 249 N.Y. 458, 164 N.E. 545). (Emphasis supplied)

This Court in *Du Pont* v. *Masland,* 244 U.S. 100, 102, held that where one accepts the role of confidant he becomes a fiduciary.

> "Whether the plaintiffs have any valuable secret or not, defendant knows the facts, whatever they are, through a special *confidence that he accepted.* The property may denied but the *confidence* cannot be." (Emphasis supplied).

We respectfully submit that the rule in *Du Pont* and *Young* is directly applicable to the case at bar. Here there was a "self-assumed responsibility to others" and a "confidence [t]he[y] accepted", and here too Holiday Inns did in fact "shake off" its responsibility towards Bromberg for its "own aggrandizement".

In *Warsofsky* (supra) 93 N.E. 2d 612, 616, the Court aptly observed:

> "If the information furnished by applicant for a loan is to be seized upon immediately by the bank official to whom it is given and if by virtue of the information he can purchase the property behind the back of the applicant, then public confidence will be seriously impaired if not utterly destroyed. In any event, *an applicant for a loan ought not to be subjected to such risks.*" (Emphasis supplied)

If we were to paraphrase the language of the above case thusly:

> "If the information furnished by an applicant for a *franchise* is to be seized upon immediately by a *major motel franchisor* to whom it is given and if by virtue of the information . . . (etc.) . . . In any event, an applicant for a franchise ought not to be subjected to such risks."

we would have precisely the same facts as the case at bar. It is clear that the information was not given by Bromberg so as to enable Holiday Inns to seize the data to buy the motel for itself at half of its initial cost. Bromberg had a right to rely upon the integrity of Holiday Inns, as a dominant franchisor, and to believe that it was sincerely trying to help him solve his financial affairs so as to put him in a position to accept the franchise, and ought not be subjected to the risk that Holiday Inns instead would buy the property behind his back.

Public policy and a respect for commercial integrity demand that a prospective franchisee, with his limited

resources should be free of fear that a franchisor, taking advantage of information furnished to it might be tempted to utilize its own superior resources, influence and prestige to its own advantage.

In *Hoeltke* v. *Kemp,* 80 F. 2d 912, 923 (CA 4th), the Court said:

> "It would be a reproach to any system of jurisprudence to permit one who has received a disclosure in confidence to thus appropriate the ideas of another without liability for wrong . . . Defendants . . . invited the disclosure."

It is petitioners' position that the determination of this Court, which establishes the standards of ethics and morality to be observed by persons in a confidential business relationship, are declaratory of law and must be followed.

In *Michoud* v. *Girod,* 45 U.S. 503, 552-555 (1846), This Court, 100 years ago, established those standards:

> "The rule of equity is . . . that a purchase by a(n) . . . agent of the particular property . . . in which he represents another . . . carries fraud on the face of it." (p. 553).
>
> "It may be laid down as a general proposition, that . . . agents . . . or *any persons* who, by their connection with any other person, or . . . concerned in his affairs, have acquired a knowledge of . . . property, and incapable of purchasing such properties themselves . . . For if persons having a confidential character were permitted to avail themselves of any *knowledge acquired* in that capacity, they might be induced . . . not to exercise it for the benefit of the persons relying upon their integrity. (p. 554)
>
> "The general rule stands upon our great moral obligation from placing ourselves in relations which ordinarily excite a conflict between self interest and integrity. It restrains all agents, public and private; . . . The disability to purchase is a consequence of that relation between them which imposes on the one a duty

to protect the interest of the other, from the faithful discharge of which duty his own personal interest may withdraw him. In this conflict of interest, the law wisely interposes. It acts not on the possibility, that is some cases, the sense of that duty may prevail over the motives of self-interest, but it provides against the probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence, and supersede that of duty . . ." (p. 555) (Emphasis supplied)

## CONCLUSION

We have not attempted in this petition to spell out all of the facts or to spell out in detail our legal position. This we feel is appropriately a function of a brief on the merits if this Court sees fit to grant certiorari.

If this case were merely a contest between two parties having no discernible effect upon the law as a whole or significant effect upon the national economy, we would not ask this Court for certiorari. We believe, however, that this case is something more than a mere controversy between private parties. We believe that the case raises an issue of general importance in our economy. This Court has not had occasion to examine this question, nor to our knowledge, has any court in the country in any other case had occasion to consider the specific issues raised in this case. We respectfully ask that the writ of certiorari issue.

Respectfully submitted,

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# APPENDIX

## Opinion of Court of Appeals ... F2d ...

November 28, 1967

Before HASTINGS, *Chief Judge,* MAJOR, *Senior Circuit Judge,* and KNOCH, *Circuit Judge.*

MAJOR, *Senior Circuit Judge.* This equitable action was instituted March 17, 1964, by Holiday Lodge, Inc., a bankrupt, and its President, Morris S. Bromberg, seeking a declaration that a motel located at 4800 Marine Drive, Chicago, Illinois, was subject to a constructive trust on the theory that it had been purchased by defendants in violation of a fiduciary relationship existing between plaintiffs and defendants.[1]

The District Court rendered a memorandum opinion (not published) which embodied its findings of fact, and concluded, "There would be no warrant for imposing a constructive trust upon the basis of a record so lacking in substance." From a judgment dismissing the complaint, plaintiffs appeal.

The contested issue here is whether the finding of the District Court that no fiduciary relationship existed between the parties was clearly erroneous.

In view of the theory upon which plaintiffs pleaded and tried their case, there is no occasion to engage in a detailed statement of facts, which plaintiffs concede are substantially as found by the District Court. The case is bottomed upon the premise that a fiduciary relationship arose from a March 14, 1962 letter written by Holiday Inns and directed to Bromberg as President of Holiday Lodge.

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[1] Subsequent to the filing of the action HIOA, Inc. was merged into Holiday Inns of America, and the defendants herein will be referred to as Holiday Inns.

As to this letter, the District Court stated:

> "As stated above this case principally turns upon the construction to be given the March 14, 1962 letter. Indeed, plaintiffs so state at page three of their post-trial brief:
>
> "'As developed at the trial, the case rests squarely on the contract of March 14.'
>
> "It is their argument that the letter was a contract for a joint venture, which created a fiduciary relationship between the parties, and which was breached when defendants acquired the motel property."

Plaintiffs reiterate their contention here. On brief they state, "The March 14, 1962 contract is basic to plaintiffs' case," and "The March 14 agreement established a fiduciary relationship between the parties. * * They sue for breach of the fiduciary obligation created by the contract."

Plaintiffs, apparently realizing the weakness of their appraisement of the March 14 letter, place much stress upon certain incidents which took place prior and subsequent thereto as showing the intent of the parties. Such reliance is misplaced. There is evidence that Wilson, Chairman of the Board of Holiday Inns, one of the largest motel chains in the country, evidenced some interest in the purchase of Holiday Lodge. On the other hand, the evidence clearly demonstrates that Holiday Lodge, which was engulfed in bankruptcy, and Jerome Morris, the Chairman of the Creditors' Committee, were strenuously engaged in an attempt to induce Holiday Inns to come to their rescue.

As a prelude to a consideration of the March 14 letter, it is important to relate Bromberg's connection with Holiday Lodge and its financial situation at that time. Bromberg, an attorney and a former general counsel of the American Motor Hotel Association, was President of the lessee-bankrupt-debtor in possession of Holiday Lodge, Inc. The fee to the motel property was held by

Central National Bank as trustee for a group of investors. Title was subject to a mortgage held by the First Federal Savings and Loan Association of Chicago (First Federal), which for over a year had been prosecuting in the State Court a foreclosure action to satisfy a defaulted mortgage indebtedness arising out of a $750,000 loan on the property.

In March 1962, Holiday Lodge was operating the motel as the debtor in possession during the pendency of a proceeding under Chapter XI of the Bankruptcy Act. At that time the total indebtedness of Holiday Lodge, with the motel as its only asset, was approximately $1,400,000. Prior to filing of a petition in bankruptcy by the general creditors of Holiday Lodge, it was operating the motel as the lessee. All the shares of stock in Holiday Lodge previously owned by Bromberg, his wife and his brother had long prior to March 14, 1962 been endorsed in blank and delivered to Morris as collateral for an outstanding loan in the amount of $100,000.

On February 3, 1961, the Bankruptcy Court in the Chapter XI proceeding entered an order restraining First Federal from pursuing its mortgage foreclosure suit, which order was continued by a further order entered July 31, 1961. From this latter order First Federal appealed. *In Re Holiday Lodge, Inc., Debtor,* 300 F.2d 516, decided March 13, 1962. In reversing such order, this Court held (page 520):

> "* * the effect of the court's restraining order was to prevent the Association from resorting to the right of foreclosure to which it was entitled under the law of Illinois."

We now turn to the March 14 letter and the circumstances under which it was written. About the first of March 1962, Bromberg met Wilson at a meeting of the Hotel Association and told him that he would like to discuss the Holiday Lodge matter "to see if some program could be worked out." On March 13, Bromberg telephoned

Wilson, who invited him to come to Memphis. This Bromberg did on the following day and, upon his arrival, Wilson referred him to Jack Ladd, Senior Vice President in charge of marketing and sales for Holiday Inns. Bromberg and Ladd engaged in a lengthy meeting which was concerned generally with the financial situation of Holiday Lodge. Bromberg in particular was seeking a means to avoid foreclosure by First Federal, and Ladd suggested that a Holiday Inn franchise might solve Bromberg's problems. At that time, according to plaintiff's brief, the parties were under the belief that the restraining order against First Federal was still in effect; they had not learned of this Court's decision rendered on the previous day, reversing such order.

Ladd prepared and delivered to Bromberg as President of Holiday Lodge a letter embodying the result of the discussion. As previously noted, plaintiffs concede that this letter is basic to their theory that a fiduciary relationship was established between plaintiffs and defendants. The letter was signed by Ladd on behalf of Holiday Inns, and the relevant portions are set forth in plaintiffs' brief as follows:

> "This letter is for the purpose of reviewing an *agreement* reached verbally . . .
>
> "We agree to accept an application from you for the purpose of joining the Holiday Inn system and we will place your application before our Executive Committee for final approval when we can ascertain that the following conditions have been met. We *assure* you that subject to the meeting of the following conditions, the *approval will be forthcoming.*
>
> "1. (Rate Structure)
>
> "2. (Restaurant)
>
> "3. (Signs)
>
> "4. . . . We would require that the holder of the first mortgage agree with you regarding a disposition of this mortgage before the Holiday Lodge could become a member of the Holiday Inns of America.

> "5. In the event a plan of arrangement can be affected *without the approval of the mortgage company* by the debtor, *then the preceding paragraph regarding the attitude of the first mortgage lender will not apply.*" (Emphasis supplied by plaintiffs.)

Referring to this letter, Bromberg testified that "all of this" was predicated upon his being able to straighten out his financial affairs. Ladd, referring to the proposed franchise, testified:

> ". . . and he [Bromberg] thought that if Holiday Inns of America would grant him a franchise, that he would be in a stronger position to raise additional equity and also to get a substantial mortgage."

We agree with the District Court that this letter did not "create a contract for a joint venture between the parties," and we might add, a contract for any other purpose. There was no consideration for the letter, it was not signed by plaintiffs and it imposed no obligation upon them. By certain and unambiguous language it was only a proposal on the part of Holiday Inns that it would accept plaintiffs' application for a franchise upon their compliance with the conditions specifically set forth. Plaintiffs made no application for a franchise, evidently in recognition of the futility of so doing because of their inability to meet the specified conditions.[2]

The fallacy of plaintiffs' position is exposed by a statement from their brief:

> "Hence, the agreement imposed firm conditions on plaintiffs and created fiduciary obligations upon defendants. If plaintiffs could make their peace with First Federal, as contemplated by paragraph 4, then a franchise was to be issued. In the alternative, if a plan could be effected without the approval of First Federal, a franchise was likewise to be issued."

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[2] We need not discuss conditions 1, 2 and 3, inasmuch as conditions 4 and 5 are mainly in controversy.

As we have noted, the letter did not require plaintiffs to do anything; it merely afforded them an opportunity to make application for a franchise if the conditions set forth were met. Making "their peace with First Federal, as contemplated by paragraph 4" could be achieved only by satisfying the mortgage indebtedness in full, and no plan of arrangement "could be effected without the approval of First Federal."[3]

Thus, both avenues by which plaintiffs were entitled to make application for a franchise were definitely closed by the refusal of First Federal to agree to any plan of arrangement under Chapter XI, and its consistent demand that the mortgagee indebtedness be satisfied in full.

Plaintiffs devote considerable effort designed to show Bromberg's good faith in attempting to obtain refinancing funds. We see no point in discussing this phase of plaintiffs' case because Bromberg received no definite commitment from any source and, as he admitted on cross-examination, he never "obtained a commitment from any source and however informal, to pay the First Federal the monies" owing on the mortgage debt.

At the request of Bromberg, Ladd attended a meeting at First Federal in May 1962, at which Bromberg introduced Ladd, who commenced talking but shortly was interrupted by a Mr. Cavanaugh, the senior officer of First Federal. There is some dispute as to just what was said at this meeting, but Bromberg's version is as follows:

> "Cavanaugh: Look, how much money have you got with you?
>
> "Ladd: About $40.
>
> "Cavanaugh: No, have you got enough money with you to pay all of the accrued interest and principal and attorneys' fees?

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[3] Plaintiffs concede in their reply brief that a "plan of arrangement" under Chapter XI cannot be effected without the approval of the mortgagee.

"Bromberg: What attorneys' fees are you talking about?

"Cavanaugh: Well, about $75,000.

"Ladd: No, not at all.

"Cavanaugh: Well, there is nothing more to talk about and let's call this meeting to a halt."

Referring to this meeting, Bromberg admitted at the trial, "Ladd did what he was able to, not what he was expected to do." It is evident that Ladd attended this meeting with the hope that he could be of assistance to Bromberg in persuading First Federal to refrain from foreclosing its mortgage. It is equally evident that any effort in this respect failed. Plaintiffs on brief, referring thereto, state, "Whatever they were, Cavanaugh, of First Federal, rudely rejected them."

Plaintiffs do not contend that Holiday Inns violated the alleged fiduciary obligation which it owed to them prior to the May 1962 meeting at First Federal; in fact, during that time Holiday Inns cooperated in an effort to aid Holiday Lodge in resolving its financial situation. On brief plaintiffs argue:

"Immediately after the May meeting at First Federal, defendants refused to have any further dealings with Bromberg and without notice to Bromberg treated the contract as if at an end. This, despite the fact that plaintiffs had a contractual right to find, and in fact, succeeded in finding tentative alternate financing through Harvey Rawson based on a franchise and Bromberg was making vigorous efforts to contact defendants so that they might proceed with the deal."

This argument rests on the false premise that the March 14, 1962 letter constituted a contract when, as shown, it was nothing more than an offer by Holiday Inns to accept Holiday Lodge's application for a franchise when the conditions specifically set forth were met.

Following the May 1962 meeting at First Federal, there was no communication, oral or written, between Brom-

berg and either Wilson or Ladd. Plaintiffs make much of the fact that Holiday Inns gave no notice of its withdrawal of the offer contained in its March 14 letter. In our view, Holiday Inns was without legal obligation in that respect because after that meeting it was known to a certainty by all parties that First Federal would proceed with its mortgagee foreclosure, thereby rendering it impossible for Bromberg to meet the conditions set forth in the March 14 letter.

We find no occasion to discuss in detail the testimony concerning the alleged financing offer made by Rawson. Relative thereto, plaintiffs on brief state:

> "After visiting Cavanaugh, at First Federal, he determined that he could not recast the original mortgage, but was willing to obtain refinancing, if and only if Bromberg obtained a Holiday Inns franchise."

The refinancing referred to was grossly insufficient in amount and was predicated upon the condition that Bromberg first obtain a franchise. Plaintiffs expose their incredible position on the Rawson matter by stating on brief, "To say that Bromberg had first to obtain the financing—without the franchise—is to thrust an impossible roadblock into the deal at its inception." This argument ignores the fact that Bromberg's right to make an application for a franchise was dependent upon his securing adequate financing, as specified in the proposal made by Holiday Inns. Now, plaintiffs would have us hold that Holiday Inns was under an obligation to grant a franchise to Holiday Lodge so that it might obtain refinancing. Obviously, Holiday Inns never assumed any such obligation.

Plaintiffs on brief continue, "What lender would issue a commitment or even waste five minutes considering a loan unless fully informed about and assured of a franchise?" We are inclined to agree that no lender would be so stupid; however, the argument comes close to an admission by plaintiffs that the conditions set forth

in the March 14 letter could not be met. The impossibility of so doing must have been recognized by all parties not later than the May meeting at First Federal, when the latter adamantly adhered to its position that its mortgage foreclosure suit would proceed to a sale.

First Federal obtained a decree of foreclosure on April 10, 1963, in which it was found there was due it the amount of $949,426.30. (An appeal by Bromberg from this decree was dismissed by an Illinois Appellate Court. *First Federal Savings & Loan* v. *4800 Marine Drive, Inc. et al.*, 49 Ill.App. 2d 218.)

While of doubtful relevancy, we note that in the meantime Wilson showed some casual interest in acquiring Holiday Lodge. For instance, on May 21, 1962, in response to a letter from Morris, the Chairman of the Creditors' Committee, Wilson stated that he would appreciate being informed if Holiday Lodge ever came up for auction following the foreclosure, as Holiday Inns "might want to bid on it if it sells cheap enough." In April, and again in May, 1963, Wilson called at First Federal to inquire as to the status of the foreclosure proceeding. However, these conversations were had incidental to other business which Wilson had in Chicago; he never came to Chicago for the purpose of discussing Holiday Lodge.

At the Master's sale on May 10, 1963, First Federal was the sole bidder and obtained title to the property with a bid of $825,000. Bromberg was among those present at the sale.

Prior to May 10, 1963, First Federal received inquiries from various prospective purchasers, and their names were kept in a file. On May 20, 1963, it sent identical letters to eight parties, including Holiday Inns, which read:

> "This is to advise that First Federal purchased the above property in a recent foreclosure sale. We now feel we are in a position to discuss sale or other disposition of this property.

"If you still have an interest as previously indicated, would you be kind enough to contact the undersigned, or Mr. Fred Harnstrom, at your convenience at an early date."

Prior to the time it obtained physical possession of the motel, First Federal tried, without success, to find a manager. In June 1963, First Federal contacted Wilson, and a temporary arrangement was made for Holiday Inns to manage the property. In a subsequent discussion, the parties agreed upon a lease, with an option on the part of Holiday Inns to purchase. On July 10, 1963, Holiday Inns proposed a form of lease to First Federal. After reviewing the situation, the latter's directors decided against leasing the property and instructed its officers to attempt to sell it. First Federal's officers then went to the Memphis headquarters of Holiday Inns on July 23, 1963, and negotiated a sale to Holiday Inns for $750,000. The transaction was closed on September 23, 1963. Having acquired title to and ownership of the property, First Federal had the legal right to dispose of it and, in our view, Holiday Inns had an equal right to purchase it. In this connection, it is pertinent to observe that there is not even a hint of collusion between First Federal and Holiday Inns.

Plaintiffs in their reply brief, referring to the May 1962 meeting at First Federal, state, "Holiday Inns had fiduciary obligations before the meeting and it continued to have such obligations after the meeting," and "The mere purchase of Holiday Lodge by Holiday Inns under the facts at bar was a wrong to plaintiffs." Even though we assume, contrary to what we hold, that Holiday Inns was under a fiduciary obligation to plaintiffs by reason of the unaccepted proposal contained in its March 14, 1962 letter, such obligation was extinguished when it became known by all parties that First Federal would proceed with its mortgage foreclosure. By that time, any ray of hope which Bromberg might have entertained was gone. After long litigation, First Federal had vindicated its right to foreclose the mortgage. The property

was sold at public sale, and First Federal made the only bid.

As previously shown, plaintiffs' case is bottomed entirely on the premise that the March 14, 1962 letter from Ladd to Bromberg was a contract for a joint venture, from which flowed the fiduciary obligation complained of. In support of the premise, plaintiffs cite a single case. *Carroll* v. *Caldwell,* 12 Ill. 2d 487, 147 N.E. 2d 69. In that case the parties entered into an agreement which involved the sharing of royalties arising from an oil and gas lease on certain property. This Court, in *Pinkowski* v. *Coglay,* 347 F.2d 411, discussed the Illinois law as announced in *Carroll,* and concluded (page 413):

> "Indispensable elements of a joint venture in Illinois appear to be an association of two or more persons to carry out a single enterprise with a legitimate purpose, a community of interest in such purpose, expectation of profits and the sharing thereof and the right of each person to direct and govern the conduct of each other person. See ibid. and 23 Illinois Law and Practice, Joint Adventures, pp. 59-65 (1956) and cases cited therein."

It is evident that this interpretation of the Illinois law is of no benefit to plaintiffs; in fact, we agree with the District Court that *Carroll* negates rather than supports plaintiffs' contention.

The fallacy of plaintiffs' reliance upon *Carroll* is further shown by the use sought to be made of it on brief:

> "There the Court held that merely because the parties had entered into an oil unitization agreement, they became joint adventurers. But for the agreement, they would not have been such, and no fiduciary relationship would have existed."

This statement alone points up the distinction between *Carroll,* where the parties had entered into an agreement, and this case, where there was no agreement (or contract). Plaintiffs' misplaced reliance on *Carroll* is further

shown by their comparison of the unitization agreement in that case with a franchise agreement. Plaintiffs argue, "There can be no doubt that the franchise relationship was a joint venture * *," and "Thus, both franchisor and franchisee had an immediate, direct stake in the gross receipts and in the continuing successful operation of the motel." This argument is based on the false premise that a franchise agreement was entered into between Holiday Inns and plaintiffs. What their relationship might have been if Holiday Inns had granted plaintiffs a franchise or obligated itself to do so is of no consequence.

We have considered all of the points which plaintiffs make on brief in support of their position and think we have sufficiently demonstrated that the case was correctly decided by the District Court. Its judgment is

AFFIRMED.

## Opinion of District Court

This is an equitable action in which plaintiffs ask this Court to impose a constructive trust in their favor upon the motel property located at 4800 Marine Drive in Chicago, by virtue of an alleged breach of a fiduciary relationship. Jurisdiction is founded upon diversity of citizenship and the requisite jurisdictional amount.

In essence, plaintiffs contend that they and defendants entered into an alleged agreement to pursue a joint venture—that being to make plaintiff, Holiday Lodge Inc., of which plaintiff Bromberg was president at all times relevant hereto a franchise member of the Holiday Inns' system. Allegedly, the agreement created a fiduciary relationship between the parties. Plaintiffs aver that defendants treated the agreement as terminated, and after the motel property was acquired in a foreclosure sale by the first mortgagee, First Federal Savings and Loan Association of Chicago, defendants purchased the property for themselves, in derogation of the alleged fiduciary relationship.

Defendants deny that any agreement was reached, that any fiduciary relationship was created, and that their purchase of the disputed property in any way infringed upon plaintiffs' legal rights.

Prior to November 15, 1958, Bromberg and his wife, who owned vacant real estate at 4800 Marine Drive, organized 4800 Marine Drive, Inc., an Illinois corporation, and conveyed this real estate to that corporation. First Federal made a first mortgage loan to 4800 Marine Drive, Inc., for $750,000, amortized over a fifteen year period, evidenced by a note and a mortgage covering said real

estate, payable in monthly installments. The mortgagor also assigned to First Federal all leases and the rents, issues and profits.

Prior to the organization of 4800 Marine Drive, Inc., Bromberg organized the plaintiff, Holiday Lodge, Inc., which took a lease of the premises for 25 years, from May 1, 1959. The lease provided that it was subordinate to the lien of any mortgage upon the premises and all advances made on the security thereof.

A motel was constructed on the premises and operations commenced in December, 1959. Financial problems arose in meeting the mortgage payments. Holiday Lodge's business did not produce sufficient income to pay the rent, taxes, and required mortgage payments, amounting in all to $10,300 a month. Partial payments were made on the mortgage, but were only sufficient to make the payments through June, 1960.

In October, 1960, the creditors of Holiday Lodge, formed a committee to try to work out the problems of the motel. But on January 30, 1961, an involuntary petition in bankruptcy was filed against Holiday Lodge and there was a general order of reference. In December, 1960, First Federal had accelerated the maturity of its mortgage note and declared the entire balance due.

On February 1, 1961, petitioning creditors filed a motion to adjudicate Holiday Lodge a bankrupt and to restrain First Federal from taking any legal action or commencing any proceeding to foreclose the trust deed executed by the "alleged bankrupt and secured on its realty" located at 4800 Marine Drive, until further order of the court. Such a restraining order was entered on February 3, 1961.

On the same day, Holiday Lodge filed a petition for an arrangement under Chapter XI of the Bankruptcy Act, and was given authority to operate its business. On February 15, 1951, First Federal filed a petition to vacate the restraining order and for leave to join Holiday Lodge as a defendant in its proposed foreclosure.

Numerous hearings followed before a referee until April 12, 1961 when, no plan or arrangement having been filed by Holiday Lodge, the referee entered a rule to show cause why the proceedings should not be dismissed.

On April 14, 1961, Holiday Lodge's petition to make an arrangement was dismissed, an order of adjudication was entered, and a receiver appointed. On May 8, 1961, the referee vacated the restraining order of February 3. This was followed by the filing of a foreclosure suit on May 11, 1961, by First Federal in the Superior Court of Cook County, Illinois.

On its review of the order of May 8, 1961, the District Court, on July 18, 1961, commenced a *de novo* hearing on the petition to vacate the restraining order of February 3, 1961. On July 31, 1961, the court made its findings, entered an order reversing the referee's orders, except the one appointing a receiver, referred the case to another referee, and specifically continued the restraining order against First Federal and denied its motion to vacate said order. An appeal followed.

On March 13, 1962, the Seventh Circuit reversed the order restraining First Federal from taking action to foreclose the mortgage. *In the Matter of Holiday Lodge, Inc.*, 300 F. 2d 516, *cert. denied*, 371 U.S. 824.

Thereafter, the foreclosure action was reactivated and the findings of the Master who heard the foreclosure

matter were filed in November, 1962. A decree of foreclosure was entered April 10, 1963. This decree contained a finding that there was due to First Federal the sum of $949,426.30. At a Master's sale, First Federal was the sole bidder. Subsequently the sale was confirmed by the court. The Association was put in possession on June 30, 1963. On May 12, 1964, the appeal from the foreclosure decree was dismissed. *First Federal Savings & Loan* v. *4800 Marine Drive, Inc., et al.*, 49 Ill. App. 2d 218.

In the period from February of 1961 to April of 1961, Holiday Lodge operated the motel as debtor in possession. The receiver operated the property from April of 1961 to January, 1962, when Holiday Lodge again operated the property as debtor in possession, a status it maintained until early 1963.

Plaintiff Bromberg became acquainted with Kemmons Wilson, Chairman of the Board of Holiday Inns prior to 1960, and in December, 1960, Wilson visited the Holiday Lodge. He was given a tour by Bromberg, and supplied with operating figures, a statement of the rates being charged for rooms, and a breakdown of the salary structure and information about expenses for utilities. Wilson appeared interested in the property, but the meeting did not reach the point of negotiations—it was merely a preliminary exchange of views.

In January, 1961, Wilson discussed the property with Jerome Morris of the creditors committee, but on February 6, 1961, he wrote to Mr. Morris that Holiday Inns would prefer to buy vacant property and build a new inn in the Chicago area. Also during that month, Wilson spoke with First Federal about a possible sale of the property to Holiday Inns, but it was a short meeting

and there was no price discussion. On February 7, 1961, Wilson wrote First Federal and stated that Holiday Inns was not interested in purchasing the mortgage, but Wilson requested that he be notified if there was a repossession and if First Federal decided that it wished to sell the property.

Bromberg testified that Wilson visited the Holiday Lodge again in August, 1961, and was given updated financial information, and in addition, a projected income report prepared by Howard Carlson of the accounting firm of Harris, Kerr, Forster & Co. Wilson does not recall this meeting. Bromberg implies that the data used to compile this report was confidential, and that Carlson was an agent of Holiday Inns. Although Carlson worked on the accounts of Holiday Inns for Harris, Kerr, there is nothing in the record to indicate that he was ever an officer, director or agent for Holiday Inns, or that he represented them in any of his dealings with Bromberg.

On March 14, 1962, Bromberg came to Memphis, Tennessee, to the main offices of Holiday Inns and was referred by Wilson to Jack Ladd, Senior Vice-President, franchise sales department. Ladd and Bromberg discussed Holiday Lodge's financial problems, and the efforts which Bromberg was making to straighten them out. He brought Ladd a four page document containing data on the current rent schedule of Holiday Lodge, a summary of operating expenses for 1961, an income and expense statement for 1961, and a month by month breakdown of the rentals received by Holiday Lodge for the years 1960 and 1961. Bromberg also testified that he brought Ladd the Carlson report and the public rate schedules of Holiday Lodge. They conferred further with regard to Holiday Inn's franchise policies.

At this meeting Ladd gave to Bromberg a letter dated March 14, 1962, which plaintiffs claim amounts to a written agreement whereby Holiday Inns was to grant a franchise to Holiday Lodge, provided the conditions set forth therein were met. The letter provides, in part:

> "We agree to accept an application from you for the purpose of joining the Holiday Inn system and we will place your application before our Executive Committee for final approval when we can ascertain that the following conditions have been met. We assure you that subject to the meeting of the following conditions, the approval will be forthcoming.
>
> 1. (Rate Structure)
> 2. (Restaurant)
> 3. (Erection of Signs)
> 4. '. . . We would require that the holder of the first mortgage agree with you regarding a disposition of this mortgage before the Holiday Lodge could become a member of the Holiday Inns of America.'
> 5. In the event a plan of arrangement can be effected without the approval of the mortgage company by the debtor, then the preceding paragraph regarding the attitude of the first mortgage lender will not apply."

This letter is of crucial importance to the decision in this case. Upon it rests plaintiffs' case. They rely upon it as a binding agreement which created a fiduciary relationship between the parties. Suffice it to say for now, defendants deny that the letter bound them in any way, and further assert that even if it did, plaintiffs have failed to comply with any of the conditions.

Following that meeting, Bromberg continued his attempts to solve the financial difficulties of Holiday Lodge, but was told by First Federal that the only thing which would stop First Federal's foreclosure action

would be payment in full of all money due. Bromberg testified that thereafter Ladd said that if Bromberg was prepared to put up $50,000, Holiday Inns would guarantee to First Federal to pay interest and principal on a current basis, all operating expenses and taxes, and also within a reasonable time thereafter, to pick up the accrued interest. Ladd denies that this conversation took place and denies that Holiday Inns agreed to make any guarantees. Wilson testified that Holiday Inns has never entered into such guarantees, and Ladd testified that he did not have the authority to make such a guarantee.

In May, 1962, a meeting was held at First Federal, attended by officials of First Federal, Bromberg, Ladd and several others. Ladd was there admittedly at the request and invitation of Bromberg. The latter testified that Ladd attempted to present the alleged guarantee arrangement described above. Ladd testified that he only came to explain the Holiday Inns' franchise arrangement as an accommodation to Bromberg in order to assist Bromberg in gaining concessions from First Federal. Whatever the facts, however, it is undisputed that the meeting, after just a few minutes, was ended abruptly by Mr. Cavanaugh of First Federal who insisted on payment in full on the accelerated mortgage plus attorneys' fees. When it was apparent that payment would not be forthcoming at that time he terminated the meeting.

Subsequent to this meeting, Bromberg claims that Harvey Rawson told him that he could get financing for him and would supply equity up to $250,000, if Bromberg could get a commitment from Holiday Inns to supply a franchise. Bromberg claims that he attempted to call Wilson and Ladd immediately, and several other times

during the ensuing month, but that they either declined to take his calls, or did not return them. Ladd and Wilson testified that it was their practice to return long distance calls, but that they either do not remember receiving such calls or are sure that if they did they attempted to return them. They were emphatic in denying that they attempted to avoid Bromberg's efforts to reach them. In any event, Bromberg admittedly did not write to either Wilson or Ladd to inform them of his alleged alternate financing offer. And it is undisputed that Rawson did not obtain a *commitment* "from any source and however informal, to pay to First Federal the moneys First Federal had demanded at the meeting through Mr. Cavanaugh." (Quotation of part of question asked to Bromberg at trial. As to whether he had obtained such a commitment he answered "No sir." Tr. 224-225). Bromberg claims that Holiday Inns was bound by its March 14 agreement to grant a franchise on the strength of this "alternate financing," and its failure to do so constituted a breach of the fiduciary relationship.

While the foreclosure action was pending, Wilson continued to express his interest in purchasing the property. Although apparently not in Chicago for the specific purpose of discussing the property at any time during the pendency of that proceeding, Wilson did have several discussions regarding it with people from First Federal. However, First Federal received inquiries from various parties expressing an interest in the Holiday Lodge property, during and prior to the pendency of the foreclosure proceeding.

Following the foreclosure sale on May 10, 1963, First Federal sent an identical letter to eight individuals, including Holiday Inns, which had previously expressed an interest in the property. The letter stated that First

Federal had acquired the property and that it was now in a position to discuss sale or other disposition of it. Wilson had a discussion with Mr. Harnstrom of First Federal on May 21, 1963, in which for the first time, there was a tentative discussion of price. Wilson testified that he had no knowledge of the letter sent out the preceding day, at the time of his conversation with Harnstrom.

Finally, on June 18 or June 19, 1963, First Federal met with Mr. Wilson and they agreed to retain Holiday Inns to manage the motel. At this time negotiations commenced for a possible lease of the motel by Holiday Inns. A lease arrangement was agreed upon and Holiday Inns took over the management of the property although a "Holiday Inn" sign was not erected because there was no written contract and final arrangements had not been worked out. On July 10, 1963, Holiday Inns forwarded a draft lease to First Federal.

During July, the Board of Directors of First Federal inspected the motel and discussed it at a board of Directors meeting. The Board determined that they desired to sell rather than to lease the motel. Following that meeting, two representatives of First Federal went to Memphis, terminated discussions concerning a lease, and negotiated a sale of the motel to Holiday Inns. The transaction was closed on September 23, 1963, for a sale price of $750,000.

As stated above, this case principally turns upon the construction to be given the March 14, 1962 letter. Indeed, plaintiffs so state at page three of their post-trial brief.

> "As developed at the trial, the case rests squarely on the contract of March 14."

It is their argument that the letter was a contract for a joint venture, which created a fiduciary relationship between the parties, and which was breached when defendants acquired the motel property.

We are asked to declare a constructive trust in favor of the plaintiffs. The Supreme Court of Illinois defined a constructive trust, in two cases, as follows:

> "Constructive trusts . . . arise by operation of law from circumstances which stamp the conduct of a person unfair or wrongful and permit him to take advantage of another. *(Fowley* v. *Braden,* 4 Ill. 2d 355; Restatement of Trusts, sec. 44)." *Carroll* v. *Caldwell,* 12 Ill. 2d 487, 493 (1957)
>
> "Constructive trusts are of two classes: one, where there is a fiduciary or confidential relationship and the subsequent abuse of that confidence; and the other where actual fraud is a basis for raising a constructive trust." *Kapraun* v. *Kapraun,* 12 Ill. 2d 348, 350 (1957).

The party seeking to establish the existence of a fiduciary relationship, including one emanating from a constructive trust based upon parol evidence, must prove the existence of that relationship "by proof, clear, convincing, strong, unequivocal and unmistakable, so as to lead to but one conclusion." *Clayton* v. *Clow & Sons,* 327 F.2d 382, 389 (7th Cir. 1964) (applying Illinois law). The cases are legion which support this view. See e.g. *Reeve* v. *Strawn,* 14 Ill. 93, 99-100 (1852); *McGinnis* v. *Jacobs,* 147 Ill. 24, 30-31 (1893); *Winkelman* v. *Winkelman,* 307 Ill. 249, 263 (1923); *Mortell* v. *Beckman,* 16 Ill. 2d 209, 212 (1959); *Perry* v. *Wyeth,* 25 Ill. 2d 250, 253 (1962).

But plaintiffs urge that these cases are inapplicable, because "what was lacking in those cases is precisely

the element here present: a written agreement creating a joint venture and thus a fiduciary relation." (page 2, plaintiff's post-trial reply brief). They correctly assert that once the fiduciary relationship is established, the burden shifts to the fiduciary to show his good faith dealing by clear and convincing proof.

This Court has not been persuaded that the March 14 letter created a contract for a joint venture between the parties. The language of the letter plainly discloses that Holiday Inns agreed *only* to accept a franchise application from Holiday Lodge:

> "We agree to accept an application from you for the purpose of joining the Holiday Inn system, and we will place your application before our Executive Committee for final approval when we can ascertain that the following conditions have been met. We assure you that subject to the meeting of the following conditions, the approval will be forthcoming."

We believe, that those words amount only to an offer by Holiday Inns to approve a franchise application upon the meeting of the five specified conditions. Holiday Lodge was not bound thereby. They could have accepted the offer by complying with the requirements.

However, in the first place, no such application was ever filed by Holiday Lodge. Secondly, we are of the opinion that at least conditions 4 and 5 have not been met. Defendants allege that conditions 1, 2 and 3 have not been met, and plaintiffs do not argue to the contrary in their briefs.

It is undisputed that First Federal not only did not agree with Holiday Lodge regarding a disposition of the mortgage, but foreclosed on it as well. Thus condition 4 was not met.

Condition 5 required:

> "In the event a plan of arrangement can be effected without the approval of the mortgage company by the debtor, then the preceding paragraph regarding the attitude of the first mortgage lender will not apply."

Defendants argue that "a plan of arrangement" should be construed in its strict sense as part of the Chapter XI proceeding, in which Holiday Lodge was involved at the time the letter was drafted. Since no such plan was ever effected, they urge that the fifth condition has not been met. Alternatively, they assert that even if "plan of arrangement" is not so limited in definition, plaintiffs failed to secure a firm alternate financing commitment.

Regardless of the interpretation which we place on the term, plaintiffs who must satisfy this Court by clear and convincing evidence so as to lead to no other conclusion but that the condition was met, have utterly failed to do so. Their reliance upon the purported alternate financing scheme obtained by Harvey Rawson does not meet the burden they must carry. For Rawson himself testified that he had obtained no firm commitments. Even the alleged tentative negotiations in which he, Rawson, was involved, were premised upon the grant of a Holiday Inns franchise. We cannot construe the fifth condition as requiring Holiday Inns to help the Holiday Lodge secure alternate means of salvaging its financial situation. The letter, quite clearly requires that a solution be found *before* an application could be approved. There would be no warrant for imposing a constructive trust upon the basis of a record so lacking in substance.

By relying in their post-trial briefs upon the March 14 letter, plaintiffs evidently realized the futility of trying to prove their case with the other evidence which they adduced. It is far short of the "clear and convincing" foundation they must build. In our thinking, neither Wilson nor Ladd entered into a fiduciary relationship with plaintiffs. Even the alleged "confidential" information given to the defendants has not been proven to be so by clear and convincing evidence.

On the basis of the record before us, we are constrained to hold for defendants.

This memorandum may be treated as embodying the Court's findings of fact and conclusions of law, and an order of judgment for the defendants, with costs, shall be submitted.

**PLAINTIFFS' EXHIBIT NO. 9**

March 14, 1962

Mr. Morris S. Bromberg, President
Holiday Lodge
4800 North Marine Drive
Chicago 40, Illinois

Dear Mr. Bromberg:

This letter is for the purpose of reviewing an agreement reached verbally at the time that you personally visited our offices in Memphis.

We agree to accept an application from you for the purpose of joining the Holiday Inn system, and we will place your application before our Executive Committee for final approval when we can ascertain that the following conditions have been met. We assure you that subject to the meeting of the following conditions, the approval will be forthcoming.

1. We understand that this condition has been determined, but we will restate it for the benefit of the record, that the rate structure of your Inn be changed in keeping with the rate structure nationally.

2. That a meeting between your restaurant manager and Holiday Inns of America be held regarding the policy of the restaurant toward the guests using the Holiday Inn.

3. Our head of our national advertising and sign department will visit you in Chicago and specify the type of signature sign that it will be necessary to erect for the purpose of identifying you with our system, and he will also work out a system of lead-in signs for the purpose of directing high speed traffic to the Inn from the outer drive.

4. We understand that at the present time the first mortgage holder has not been sufficiently satisfied regarding its attitude toward the loan that has been in default or any plan for extension thereof. We would require that the holder of the first mortgage agree with you regarding the disposition of this mortgage before the Holiday Lodge could become a member of the Holiday Inns of America.

5. In the event a plan of arrangement can be effected without the approval of the mortgage company by the debtor, then the preceding paragraph regarding the attitude of the first mortgage lender will not apply.

The following is made as an explanation and is not a condition of this letter. Holiday Inns of America has, over a period of years, accepted into its national system quite a number of Inns that were in existance without the Holiday Inn indentification. I might add, however, that in all instances these Inns were of comparable or better construction and as good or more luxurious rooms that Holiday Inn has. It has been Holiday Inns experience that when these Inns were added to our system, these Inns have in a period of six months increased occupancy a minimum of 20%. We will be happy to furnish statistics bearing out the above statement which any authorized person or parties may require by advising the said person of the location and address of these Inns so that direct requests may be made for the purpose of bearing out the above statement.

We feel sure that the national scope of the Holiday Inn system and its ability to refer, both directly and indirectly, will effect the same conditions for your Holiday Lodge in Chicago. I wish you to understand that this is not a guarantee, but is made in good faith by an organization with over 235 Inns open and 65 under construction, and we seriously consider any statement of this nature before it is made, for a failure to perform I am sure would damage the system nationally much more than it would the individual.

We will hold in abeyance any further activity until all the above conditions have been accepted, and I request that this may be expedited so that you may take advantage of the tremendous tourist season which is immediately ahead of us.

Very truly yours,

HOLIDAY INNS OF AMERICA, INC.
Jack Ladd,
Senior Vice-President
Franchise Sales Department

## PLAINTIFF'S EXHIBIT No. 12

**Memorandum from Ladd to Wilson dated March 14, 1962**

"We have had Maurie Bromberg from Chicago in the bulk of this day. I think we have worked out with him a reasonable approach to his many problems. I have given him a letter, a copy of which is in our files, if you would care to see it.

"He is going on and work with Howard Carlson in attempting to adjudicate his situation with the first mortgage lender and also will attempt to settle the question of his proprietorship in the Courts within the next two or possibly three weeks.

"I have agreed to send Les Price up to work out the placing of the Sign and I would appreciate your giving Les some of your ideas regarding this before he goes. We will keep you informed of the progress on this situation."

**PLAINTIFF'S EXHIBIT NO. 15**

May 21, 1962

Mr. Jerome S. Morris, Attorney
33 North LaSalle Street
Chicago 2, Illinois

Dear Jerome:

Please pardon the delay in answering your letter of April 21, as I have been on a business trip to Hawaii and the West Coast.

If the Holiday Lodge does come up for auction I would appreciate you letting me know as we might want to bid on it, if it sells cheap enough.

We have a rule at Holiday Inns that no one can operate a Holiday Inn who has any other hotel interest. This apparently would eliminate Mr. Manny Skar from operating a Holiday Inn on South Cicero Avenue.

We have just started a new management division of our company where if after inspection of the Sahara on Cicero Avenue we were satisfied that it was first class in every way we would operate same on a contractual basis. We would put the owner on a 5% management fee basis, providing the name were changed to Holiday Inn. This would not make any difference with his other ownership as this motel would be completely under our jurisdiction. Please talk to Mr. Skar along these lines, and if he is interested I would like very much for him to come to Memphis. I believe we could greatly increase the volume of business he is now doing.

Kindest personal regards.

Sincerely yours,

Kemmons Wilson
KW/ct